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Quarter: the warrior's dilemma

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QUARTER:

THE WARRIOR'S DILEMMA

by

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QUARTER:

THE WARRIOR'S DILEMMA

A Thesis

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by

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SCOPE

A consideration of the issues, legal and moral, vis-a-vis the practical applications of quarter and the duty of a belligerent to capture and/or accept the surrender of his enemy.

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PRELUDE[1]

"They passed two dead cows, torn open by shells, lying feet up in the corner of a field. . . . There were dead Germans and dead Americans strewn at random in the careless exposure of death, and it was impossible to tell from the manner in which they lay or the direction of their weapons what the lines had been or how the battle had gone. . . . In one field, in an almost mathematically spaced line, there were the bodies of five Americans whose parachutes had never opened. They had hit so hard they had driven into the ground, and their straps had burst and their equipment lay scattered around them as though ready for a kind of drunken inspection in a foreign army. . . .

"Twenty meters on the other side of the hedge there were two paratroopers out in the open, working to free another American who had been caught in a tree, and was hanging there, helplessly, swaying six feet from the ground. Christian fired two short bursts and the two men on the ground fell immediately. One of them moved and started to get up on one elbow. Christian fired again and the man fell over on his back and lay still.

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[1] From the novel THE YOUNG LIONS by Irwin Shaw.

"The man in the tree yanked furiously at his cords, but he could not break free. . . . Christian grinned up at the American. 'How do you like France, Sammy?' Christian asked.

"'S_ _ _ on you, Bud,' said the paratrooper. He had a tough, athlete's face, with a broken nose and cold, tough eyes. But he stopped struggling with the traces and just hung there, staring at Christian. 'I'll tell you what, Kraut-face,' the American said, 'you cut me down and I'll accept your surrender.'

"Christian smiled at him. If only I had a few like him with me today. . . [then]. . . He shot the paratrooper.

"Christian patted the dead man's leg, with a gesture which he himself did not understand, part pity, part admiration, part mockery. . . . Ah, Christian thought, if they are all like that, we are not going to do very well against them."[2]

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[2] Shaw, The Young Lions 455-456 (1948).

I. INTRODUCTION

At no time in history has war and all of its terrors and horrors been so poignantly brought to the attention of the civilized world as they have today. There is one phenomenon that clearly stands out at this time and that is the aspect of mass communication. No matter what the event, if there is someone to report it, it is likely to be well known in a brief space of time. As a result, the human element of war is in greater focus today than ever before and its emotional aspects are transmitted to and felt by millions of people almost as they occur. This awareness of war has created for them an emotional involvement in battles that not too many years ago would have been noted only briefly with detached interest as something happening to unknown persons in unpronounceable places. But war today, and all of its attendant circumstances, are cast in a new light, particularly for many persons in America who have been neither the victims of, nor subjected to, the violence of war.

It is thus in this light--that is to say--the acute, emotional awareness of war and its evils--that I propose my thesis. Conceding that war must have laws and that it is a fallacy to suggest that necessity knows no law, I

submit at the same time that the laws of war cannot be inflexible, and the various rules such as those which relate to a principle of quarter, especially, must have permissible exceptions. Thus, it is my thesis that there can be no unqualified rule that proscribes a denial of quarter in every given instance. The decision whether "to kill or give quarter" has been the warrior's dilemma as long as "civilized" nations have warred against one another. Attempts have been made to dispose of this dilemma by issuing blanket proscriptions against a denial of quarter under any circumstances, but I contend that such attempts are unrealistic and unacceptable in light of modern warfare.

Advances in the art of war have turned the land, sea and air into one huge battleground. The whole world, and potentially the entire universe, have been converted by the genius of science into possible theatres of war. Our next advance may well be combat in the outer reaches of space which is more than a mere possibility today, with or without an answer to the UFO's.[3] I propose that such advances have reduced any attempt to codify an <u>unqualified</u>

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[3] Students and lovers of science fiction may find the not so fictional book by Frank Edwards, FLYING SAUCERS - SERIOUS BUSINESS (1966), thought provoking in this area.

rule of quarter to a practical impossibility. The circumstances which give rise to so-called "rules of land warfare" are sometimes related and sometimes as distinct from those of naval warfare as both of these are, of necessity, related and at the same time distinct from those of aerial warfare with its rapidly changing concepts evoked by jets, rockets and missiles.

As a Marine officer, I am, by virtue of the mission of the Marine Corps, vitally interested in the three general areas of combat--land, sea and air. Any student of war, however, may find that it is essential to an understanding of the futility of attempting to lay down an invariable set of rules relating to quarter, to examine the existing conventional and customary rules vis-a-vis the practical application thereof as they relate to war on land, on the sea and in the air. The variance in circumstances, modes of battle and practical considerations is factually interesting as well as legally significant.

As convenient divisions, after a brief history of quarter, I begin with combat on land, introduced by the illustration in the prelude, and progress respectively to naval and aerial warfare. The division is made essentially to enable us to examine the shortcomings and

inexactitudes of any unqualified rule of quarter as applied to each general area and type of combat. I urge the reader to keep in mind, however, that these areas often overlap and a combination of all may well occur in any combat situation.[4]

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[4] For example, World War II, the Korean Conflict and the War in Vietnam have seen many instances of combined land, sea and air operations in which each phase played an essential role.

II. A BRIEF HISTORY OF QUARTER

No precise time can be attributed to a general acceptance of "quarter" as a principle of warfare, but its origins can be traced back in early history as far as the Greeks and Romans hundreds of years before the coming of Christ. History records that some of the early war practices among the so-called civilizations of ancient times were for the most part unrestrained in cruelty, ferocity, barbaric treatment and a general disregard of all considerations, save the attainment of the belligerents' objectives by whatever means possible.[5] The indiscriminate slaughter of troops, camp followers, women and children of the Assyrians, Hebrews, Chinese, Hindus, Persians, Macedonians, Carthaginians and Greeks, and the inhumane methods of torture and death are grim precursors of the barbarism of modern day Hitlers, Himmlers and Tojos. Prisoners were sacrificed to the gods, corpses mutilated and mercy refused to children and to the old and sickly.[6]

The earlier wars of Rome as well were characterized by such outrages. In the war against the Auruncians, 503 B. C.,

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5. 2 Phillipson, The International Law and Customs of Ancient Greece and Rome, 203 (1911).

6. *Id.* at 208.

quarter was deliberately refused, giving some evidence to the awareness of the concept at least. Prisoners were indiscriminately slaughtered, and unbridled ferocity was shown both during the conflict and after. In the Punic war, no quarter was given to the Carthaginians. In the war with the Samnites, in 320 B. C., it is related that the Romans slew, without distinction those who offered resistance and those who fled, those who were armed and those who were defenseless, freemen and slaves, young and old, men and cattle.[7]

The history of the ancient world is replete with such inhumanity, and yet, in the last two hundred years before Christ, there appeared an undercurrent of an appeal for milder practices and the Greeks became the avants-courriers of the less severe character of war. By any standards many of the practices were still brutal, but there was an awareness that the thirst for blood and slaughter were violative of the inherent nature of man, and a supranational concept relating to humane doctrines was finding seed. From time to time, poets and philosophers, orators and historians proclaimed these doctrines. Plato conceived a republic based upon perfect justice. Aristotle condemned the principle of retaliation as being antagonistic to true justice.

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[7] *Id.* at 224.

Euripedes speaks of excesses in war not only as acts of intrinsic wickedness and transgressions against universal law, but indeed, as suicidal folly on the part of the offender.[8] Diodorus observed that every war has laws of some kind, which included the giving of a kind of quarter,that is, "not to injure suppliants who have thrown themselves on the mercy of their victors."[9]

The Romans progressed in the humanities of warfare even more rapidly than the Greeks and demonstrated by the end of the B. C. era an advance well ahead of all other ancient nations. "On the whole, we perceive further mitigations, and more deliberate attempts to regularize belligerent proceedings, and a greater disposition to insist on and appeal to the sanctions of positive law, apart from those of sacred law."[10]

In a thesis of restricted length, it is not possible to attempt anything but a brief history of the underlying theme. Therefore, I must regrettably proceed from the interesting ancient history of warfare and leave the antiquities

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[8] _Id_. at 222.

[9] Diodor. xxx 18.2.

[10] PHILLIPSON, p. 223.

generally with the thought that although no positive rule had been formulated in ancient days, there was a definite awareness of quarter as a concept and of a denial of quarter as being justified only under certain circumstances[11] such as was found in the law of retaliation wherein quarter was denied as a means of retaliation. The latter formed a definite part of the ancient law of Rome and Greece and was sanctioned as the jus talionis,[12] i.e. an eye for an eye, a limb for a limb. The historical significance lies then not in when the concept arose, but rather in the fact that it arose at all. I speak now of a concept, not hard and fast rules, and I raise the point to emphasize the awareness of the concept even among early civilizations, including tribes who were branded as barbaric for the most part.

Eventually the concepts gave way to more definitive principles and Huig De Groot (whom we know and venerate

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[11] See Wright, The Bombardment of Damascus, 20 Am. J. of Int. Law 263 at 266: "Does international law require the application of laws of war to people of a different civilization? The ancient Israelites are said to have denied the usual war restrictions to certain tribes. . . , the ancient Greeks considered the rules of war. . . inapplicable to barbarians, and medieval Christian civilization took a similar attitude toward war with the infidel."

[12] Diodor. xii. 17.4

under the latinized name of Hugo Grotius) gives evidence that the concept of quarter had become a well developed principle of warfare by 1625 A. D. in his celebrated work, De jure belli ac pacis libri tres. Whatever moved Grotius to compose the law of nations is not important to this thesis. What is significant, inter alia, in his extraordinary achievement, is that he recognized the evolution of the concept and made it a solemn pronouncement in his monumental work. Chapter XI, which deals with "Moderation with Respect to the Right of Killing in a Lawful War," devotes several sections to quarter.[13] Grotius contended that:

> . . . the surrender of those who yield upon condition that their lives be spared ought not to be rejected, either in battle or in siege[14]. . . . The same sense of justice bids that those be spared who yield themselves unconditionally to the victor, or who become suppliant. . . .[15] Against these

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[13] Section XIV concerns itself with "the surrender of those who wish to yield upon fair terms should be accepted." Section XV deals with "those also who have surrendered unconditionally should be spared." Section XVI concerns itself with the injustice of retaliation and a denial of quarter. See: Volume Two, The Translation, Book 1, by Francis W. Kelsey (Oxford, Clarendon Press, London, 1925).

[14] Grotius, De jure belli ac pacis libri tres (1625). See translation cited in note 13, at p. 739.

[15] Id. at 740.

> precepts of justice and the law of nature exceptions are frequently offered, which are by no means just, as for example, if retaliation is required. . . . Yet he who recalls what has previously been said in regard to valid reasons for putting to death will easily perceive that such exceptions do not afford just grounds for an execution.[16]

The evolution was long and painful, however, and many heads were impaled on the lance, hundreds of thousands of men, women and children were butchered, and the innocent died the same slow agonizing deaths as the warriors. It mattered not that they perhaps tried to surrender, or were needlessly annihilated on orders of no quarter. Over the centuries more persons died as victims of a barbaric ignoring of principles of warfare than can be recounted. It was natural then as the ability to make war became more sophisticated among "civilized nations" that standards of conduct in warfare should evolve as well. We have come a long way, and where it is possible to destroy hundreds of thousands with one bomb, it is understandable that attempts have been made to ameliorate the horrors of war as much as possible. Thus today we find some humane concepts of warfare and various attempts to regulate the conduct of war

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16. *Ibid*.

and the warriors.[17] These include customary and moral principles and attempts at codification of such principles by international conventions.[18]

A detailed discussion of these modern principles that evolved to a so-called point of refinement in conventional international law is presented in the areas that follow. One aspect which I wish to emphasize as part of the historical development is that the conventional international principles were apparently influenced by French attitudes. Whether this was good or bad remains to be seen, and I raise no issue as to the calibre of the French either as diplomats or soldiers. I only note that the language of the conventions[19] as it relates to principles of quarter fills me with certain misgivings. A literal reading of Article 23 gives emphasis to the proposition that "thou shalt not deny quarter" and if you do, the actor shall find himself in the position of having to affirmatively defend his conduct.

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17. See U. S. DEPT OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956) and U. S. NAVY DEPARTMENT, PUBLICATION, NWIP 10-2, LAW OF NAVAL WARFARE (U) (1959).

18. See Hague Regulations respecting the Laws and Customs of War on Land, adopted by the Hague Peace Conference of 1907, hereinafter cited as Hague Regulations.

19. Hague Regulations.

In fairness to the French, however, there are many writers who are just as dogmatic in their approach to this principle as is the language of the conventions. Percy Bordwell in writing on the taking of Port Arthur by the Japanese and their refusal to give quarter remarked:

> The taking of Port Arthur was the one regrettable incident of the war on the part of the Japanese. . . . It was the torture and mutilation of those Japanese who happened to be made prisoners during the operations against Port Arthur which stung their fellow countrymen into madness, and explains, though nothing can excuse, the massacres which were carried on by them for four days after the place was taken.[20]

Baty and Morgan[21] speak of the distinction between combatants and noncombatants and add:

> No distinction is more vital to the conduct of war and the amelioration of its horrors than that which separates combatants from noncombatants. . . . Each class has its privileges--the combatant must, of course, expect to be killed in combat, but he is entitled to quarter if he throws down his arms, and, if captured, he can claim to be treated as a prisoner of war.[22]

George B. Davis, a noted authority on International Law, wrote in 1916:

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[20] Bordwell, The Law of War between Belligerents, 118 (1908).

[21] Baty and Morgan, War Its Conduct and Legal Results, 171 (1915).

[22] Id. at 172.

> A belligerent cannot refuse to give quarter, nor can he announce his intention to give no quarter, except in case of some conduct of the enemy in gross violation of the laws of war, and then only in the way of retaliation for similar acts.[23]

A noted theologian writes:[24]

> Another ruling of the natural law or, at least, of the law of nations pertaining to warfare, forbids that a prisoner of war be put to death unless he has first been proved guilty of some grave crime through a fair trial. By prisoner of war is meant a soldier who has surrendered or has been captured and is unable to continue hostilities. To kill a soldier of the enemy after he has manifested his desire to surrender is an act of murder, unless there is good reason to believe he is only pretending to give himself up and is planning to turn against his captors.[25]

In a leading authoritative treatise on International Law,[26] the principle of quarter is clearly announced:

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23. Davis, The Elements of International Law, 297 (4th ed. 1916). On the issue of denial of quarter as a means of reprisal and retaliation see Section VI, infra.

24. Very Reverend Francis J. Connell, C. Ss. R., Std, The Ethics of War (1954).

25. Id. at 21. It appears that this seemingly simple statement of theologian Connell actually raises several issues, some of which argue against each other. Regrettably the answer is not as easy as the theologian would like it to be. A discussion of the moral aspects of quarter is included in subsequent sections.

26. II Oppenheim's International Law (7th ed., Lauterpacht 1952).

> Every combatant may be killed or wounded. . . . But combatants may only be killed or wounded if they are able and willing to fight or to resist capture. Therefore combatants disabled by sickness or wounds may not be killed. Further, such combatants as lay down their arms and surrender or do not resist being made prisoners, may neither be killed nor wounded, but must be given quarter.[27] /Emphasis added/.

The concept has thus descended down the bloody centuries into a principle which at first blush appears uncomplicated. The implications of its practical application, however, are monumental, and the dogmatic approach that some authorities take to the suggestion of a hard and fast rule is disconcerting. This can be seen from the modern consequences of alleged denials of quarter which are reflected in war crime trials following the second World War. During that war the German High Command issued orders relating to commandos. The orders directed that members of such units were to be executed, even though in uniform and notwithstanding that they might attempt to surrender.[28] At the war trials, findings of fact were

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[27] Id. at 338.

[28] See 1 War Crimes Reports 33 (1946). The order provided, among other things: "Henceforth all enemy troops encountered by German troops during so-called commando operations, in Europe or in Africa, though they appear in uniform. . . armed or unarmed, are to be exterminated to the last man, either in combat or in pursuit. It matters not in the least whether they have been landed by ships or planes or dropped by parachute. If such men appear to be about to surrender, no quarter should be given to them on general principle."

made by the International Military Tribunal at Nuremberg that many members of such commando units were killed pursuant to such orders. That tribunal held, whether rightly or wrongly, that certain accused, including the Chief of the German High Command, who promulgated these orders or who effectuated them were guilty of a war crime. The case of General Dostler[29] decided in Rome by a United States Military Commission is illustrative. The accused was found guilty and condemned to death for ordering, in pursuance of the above-mentioned order, the shooting of fifteen American prisoners of war who were landed two hundred and fifty miles behind the front in Italy, in uniform, and were engaged in demolishing a tunnel and railway. In 1945 a Canadian Military Court convicted and sentenced to death one Kurt Meyer, a commander of a German Regiment, "for having incited his troops to deny quarter to Allied troops."[30]

In short the concept of quarter has come a long way from the bloody battlefields of ancient Greece and Rome so that today it is more than just a concept, it is a principle of international law, the violation of which makes the

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[29] Id. at 22-33.

[30] 4 War Crimes Reports 97 (1948). (The Abbays Ardenne case).

violator a war criminal, for which he can be sentenced to the ultimate penalty by the "victors". A consequence of such magnitude compels a close examination of this principle of law, and further compels inquiry as to whether such principle is right or wrong. The question is, can there logically and rightfully exist an unqualified rule of quarter as the principle relates to modern warfare, as we have known war--as we are presently engaged in it--and as we prepare for its expanded potential in the twentieth century and perhaps in the twenty-first?

III. QUARTER AND ITS PRACTICAL APPLICATION VIS-A-VIS THE PRINCIPLES OF LAND WARFARE

In the prelude we were introduced to Sergeant Christian Diestl of the German Army, one of Irwin Shaw's "Young Lions."[31] Tactically Christian was in a bind. He had lost most of his company and his commanding officer. He was the remaining ranking person trying to lead the remnants of his company out of an encircled position. He had no forces to accomplish the taking of prisoners and his primary mission was the withdrawal of his men out of the trap. His actions in shooting the two paratroopers who were trying to free the man caught in the tree were legitimate acts of war. They were enemy combatants and had not fallen into his power. But what of the third man dangling by his harness six feet off the ground? Certainly he had been temporarily rendered _hors de combat_, but by no means had it been by his own choice, nor did he seek or offer to surrender himself. On the contrary, he rather courageously, but foolishly, demanded the inconceivable. He demanded the surrender of an enemy who held the upper hand. Perhaps in the technical sense you might say he "had fallen into the power of his enemy," but it is obvious that his will to resist

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[31] Shaw _op cit_. _supra_ note 2.

had not been altered, and that he would continue to resist at every given opportunity. Thus was he to live or die? To allow him to live and remain in the tree was potentially dangerous to Christian and his men, since the paratrooper might be freed shortly after the Germans had passed and their route of escape would be revealed. To take him prisoner would be difficult and possibly defeat the orderly withdrawal from the trap. What other choice was left in reality but to kill him? The man was brave (albeit reckless) and could hardly have been considered a prisoner of war per se, merely because of his misfortune in getting caught in the tree. Was he really any different while hanging in the tree than any other hostile combatant descending by parachute upon whom the "laws of war" do not prohibit firing?[32] Was there actually an "illegal" denial of quarter in the conventional sense?

The answer, of course, is not clear cut, but an examination of the principles of quarter and the form in which they are enunciated today will be helpful in arriving at an appropriate answer.

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[32] U. S. DEPARTMENT OF ARMY PAMPHLET 27-10, THE LAW OF LAND WARFARE (1956), Sec. II, paragraph 30: "The law of war does not prohibit firing upon paratroopers or other persons who are or appear to be bound upon hostile missions while such persons are descending by parachute. . . ."

The evolvement of the concept of quarter into a principle of customary law ultimately resulted in a codification of the principle as a restatement of International Law.[33]

These conventions provide that:

> Besides the prohibitions provided by Special Conventions, it is especially prohibited
>
> (a) . . . .
>
> (b) . . . .
>
> (c) To kill or wound an enemy who, having laid down [his] arms, or having no longer means of defense, has surrendered at discretion;
>
> (d) To declare that no quarter will be given;[34]

The first codification of a body of rules governing land warfare was a document authored and compiled by Dr. Francis Lieber, entitled Instructions for the Government of

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[33] Art. 23(c) and (d), Hague Regulations.

[34] Ibid. Article 23 corresponds exactly, aside from some changes of wording, to Article 13 of the Declaration of Brussels of 1874. The Geneva Conventions of 1929 and 1949 relating to the Treatment of Prisoners of War are silent as to quarter per se. By inference, however, it is noted that the proscriptions of Hague remain in full force and effect. A serious question as to use of a denial of quarter as a means of reprisal remains unanswered in any of the conventions. Article 50 of the Hague Convention of 1907 which reads, "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible," is the only article which implies a use of reprisal in this sense, but its language falls far short of a proscription in this regard.

the Armies of the United States in the Field, General Orders No. 100, April 24, 1863. It was generally known as the "Lieber Code." This monumental work formed the basis and inspiration for the Brussels Declaration of 1874 which in turn served as the foundation for the Hague Conventions of 1899 and 1907.[35] The Lieber Code provided against a refusal to give quarter except under certain circumstances, such as a commander being in "great straits, when his own salvation makes it impossible to cumber himself with prisoners,"[36] or as a form of reprisal when it is known that enemy troops give none,[37] or when enemy troops "fight in the uniform of their enemies, without any plain striking, and uniform mark of distinction of their own."[38]

As a result of the flat prohibition against declaring that no quarter would be given as contained in Article 23(c) and (d) of the Hague Regulations of 1907, Lieber's Code has been modified significantly in the current United States

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35. II Oppenheim's International Law (7th ed., Lauterpacht) 228 (1952).

36. Lieber, art. 60.

37. Lieber, art. 62.

38. Lieber, art. 63.

Army Field Manual setting forth "The Law of Land Warfare,"[39] and no exceptions are spelled out. It is interesting to note that the language is without qualification,[40] but no satisfactory explanation for this is available in the military archives. I suspect that the drafters of the manual tried to stick as close to the international conventions as possible, and as a result were preoccupied with a desire to simplify the rules of conduct relating to land warfare.

The question is not always this easy, however, for the man engaged in bitter combat. It is an obvious truism that as long as a soldier fights and resists he may be killed. War is cruel and it is painful to see human blood ebbing away, but during the passion of battle there is little time for sentiment or pity by one combatant towards another. Sir Thomas Barclay, in his preface to International Law and Practice,[41] wrote somewhat optimistically that:

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[39] U. S. DEPARTMENT OF ARMY PAMPHLET 27-10, THE LAW OF LAND WARFARE (1956). Paragraph 28 reads: Refusal of Quarter. It is especially forbidden * * * to declare that no quarter will be given. Paragraph 29 reads: Injury Forbidden After Surrender. It is especially forbidden * * * to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion.

[40] Ibid.

[41] Sweet and Maxwell, Ltd. (London 1917).

> Wars are explosions of national anger, and, while the excitement lasts, nations are just about as sensible as individuals in the midst of a violent quarrel. That the excitement will exhaust itself and men will return to a normal state of mind and see things in their proper proportions is as certain as the play of action and reaction in the course of things mundane in general.[42]

We are concerned, however, with the precise moment in time when, in the heat of battle, the soldier, be he the commander or private, must decide to kill or capture. It is at this moment that the practical issues relating to quarter genuinely arise, and as stated above, it is interesting to note that no ready solution is offered or suggested by the "codes" that at present proscribe a denial of quarter without qualification. It would appear more reasonable to suggest that such general prohibitions should not and do not exclude every hypothesis of an actual denial of quarter, particularly in a fast moving attack where the subtle distinctions between discretion and valor are not easy to distinguish.

Before pursuing this point, however, an examination of the practical considerations involved in the granting or denial of quarter is essential in the evaluation of the legal principles concerned. It is immediately apparent that these

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[42] *Id.* at viii.

practical aspects must include, inter alia, a consideration of the tactical, political and economic factors. The tactical features are the most significant, and I thus defer their discussion until the completion of a brief comment on the political and economic aspects.

Politically speaking, a general denial of quarter would be fatal in this day of mass communication. While our country is presently engaged in a substantial war against Communist aggression, we are enjoined more than ever before to observe and practice the humanities of war, anamolous as these terms may be. It is not my thesis to advocate under any circumstances a general denial of quarter, and I concur wholeheartedly in an unequivocal proscription of such conduct. If we of the armed forces are to represent truly democratic attitudes towards the rest of the world, we must certainly bear in mind the dignity of our fellow beings, whether friend or foe, and respect the inherent right to life under appropriate conditions. Thus, both from the moral principles and the political factors, we find ourselves in the spotlight and the repercussions of a general denial of quarter as a doctrine of war would be disastrous for the cause of freedom and democracy.

On the other hand there are definite reasons why a blanket proscription against a denial of quarter under certain "reasonable

circumstances" is as equally impractical. As noted in Lieber's Code,[43] a commander was permitted to direct his troops to give no quarter, if he found himself in great straits, and when his own salvation made it impossible to cumber himself with prisoners. This impossible situation can, and often does, arise from tactical and economic reasons. Economy of forces and materials dictates not only the unfeasability of taking prisoners but, more often than not, the impossibility thereof. A fast moving attack unto a final objective which requires the taking of one or more intermediate objectives calls for a maximum economy of forces. Quite often such combat involves understrength units to begin with, and it is unrealistic to suggest that prisoners should be made of enemy personnel on the intermediate objectives. An enemy with a will to resist is at best a reluctant prisoner, and a large number of such prisoners can create a serious, if not fatal, loss of available combat troops who would have to be employed as guards. Under such circumstances you obviously also could not release these persons on the intermediate objective.

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[43] Lieber, art. 60.

Even more acute is the situation behind the lines. A combat patrol is seldom in a position to take more than a handful of prisoners required for interrogation purposes. A reconnaisance patrol rarely, if ever, can afford to take <u>any</u> prisoners. What then of the situation where a large number of the enemy desires to surrender, either to the patrol behind the lines or to the unit in the attack over an intermediate objective where exploitation of success demands a continued advance to the main objective. In each situation the enemy has not attained the precise status of a prisoner of war, since there is that brief moment in time that divides the combatant from the prisoner. The difficult decision, the warrior's dilemma, arises at this very instant.

The controlling convention[44] defines prisoners of war as persons of a certain category who have "fallen into the power of the enemy."[45] The quoted language replaced the word "captured" which appeared in the 1929 conventions, ostensibly to preclude any ambiguity. Does it really accomplish this? When has such person "fallen into the power of the

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[44] Geneva Conventions of 12 August 1949, III, Relative to the Treatment of Prisoners of War.

[45] <u>Ibid</u>. art. 4A.

enemy?" Is it when he, the potential prisoner, decides at his <u>discretion</u> to quit? Or is it only when his total ability to resist is overcome despite his continued will to resist? In a fast moving attack or other situation precarious to the accomplishment of the mission, there is often no clear cut distinction, and seldom, if ever, is there a rule of thumb available to analyze the situation. The words may have been intended to preclude any ambiguity, but it is doubtful that the efficacy desired by the language was actually obtained.

This leads then to a consideration of the tactical aspects which were illustrated in part in the foregoing portions. Notwithstanding other motivations, be they political, economic or moral, it is the tactical pressure of combat that controls most decisions relating to quarter. Certainly it is easy to sit at the conference table, where hindsight is 20/20, and reflect on the horrors of war. But in reality, it is the man on the spot who must decide. What then of the warrior who is stirred by the "noise of battle, and the sight of the dead and dying, and the feelings of weariness after long hardships, who is weakened in his sense of fairness or driven to excesses out of constant fear of imminent death and thus refuses to give quarter and forces his adversary to drink

from the bitter cup of Death?"[46] This is the man upon whom the issue really focuses.

To fully appreciate the tactical aspects, it is necessary to briefly inquire into the circumstances under which the rule of quarter is applicable. Thus, although digressing slightly, an examination of some of the basic definitions and distinctions is appropriate so as to lay the foundation for a critique of the law of quarter as it applies to the various situations. I believe the following definitions, which include counter-insurgency, are particularly timely today in light of the significant conflicts in Southeast Asia and South America.

The definition of <u>international war</u>, or war between international states, is by far the most obvious and least troublesome. It may not always be a declared war, but its form is generally unmistakable and is easily recognizable. Without attempting a definition that is all inclusive, it suffices to say that such <u>war</u> is the exercise of violence by one state or international body politic against another. It is, <u>inter alia</u>, a means of implementing political policy by violence.

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[46] Fooks, Prisoners of War, 113-114 (1924).

Insurgency, on the other hand, is not always easy to recognize. One of the better definitions that I have seen is contained in an excellent text[47] by John S. Pustay, Major, USAF, to the effect:

> The term insurgency warfare . . . refers to that composite conflict phenomenon which can be defined as a cellular development of resistance against an incumbent political regime and which expands from the initial stage of subversion--infiltration through the intermediate stages of overt resistance by small armed bands and insurrection to final fruition in civil war.[48]

As a logical sequitur, counterinsurgency can then be defined, as those doctrines, instrumentalities and measures, political, economic, psychological, civic and military, which are designed and employed to aid in the prevention of insurgency warfare. I emphasize the words military and prevention to illustrate that the prevention of insurgency often takes the form of military action as a means of counterinsurgency. The answer to the question as to whether the rules of warfare apply to insurgencies and counter insurgencies lies somewhere between two extremes. On one hand you

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[47] Pustay, Counterinsurgency Warfare (Free Press, New York 1965).

[48] *Id.* at 5.

had attitudes of a more ancient vintage like those of Colonel Winthrop who held that "Guerrillas" or irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not, in general, recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death.[49]

Also Secretary of State Stimson declared in 1929 that, "non-recognized rebels have no international legal status. . . . They are from the standpoint of legal principle. . . in no better position than ordinary outlaws and bandits."[50] On the other hand "the four Geneva Conventions of 1949 provide uniformly that in the case of an armed conflict not of an international character occurring in the territory of one of the parties to the Convention each party shall be bound to apply, as a minimum, certain humanitarian provisions of a fundamental character,"[51] such as quarter, prisoner of

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[49] Winthrop's Military Law and Precedents (2d ed.) 783 (1920).

[50] I Hackworth, Digest of International Law 325 (1940).

[51] See Article 3, common to all four Geneva Conventions of August 12, 1949.

war status and the like. The Law of Limited International Conflict[52] goes even further and announces without qualification that:

> Individual guerrillas are entitled to full combatant status. They need not be in possession of any identification or authorization to that effect. It is sufficient that they belong to /any/ organized movement, and, of course, be under the command of a person responsible for his subordinates.[53] (Emphasis added.)

Such combatant status would thus afford the guerrilla all the rights of any other soldier in war, including quarter.

Considering the two extremes, I contend that the opposing forces in any insurgency, counter-insurgency or guerrilla type warfare for all practical purposes should treat each other as combatants for purposes of the laws of warfare, and should observe the laws and customs of war so long as they are under responsible commanders and are apparently at least one step above the bandit or brigand. An example of the problems that can arise in this area concerns an incident in the Philippines in 1901, which formed the basis of an interesting book by Joseph L. Schoff.[54]

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[52] A Study by the Institute of World Polity, Edmund A. Walsh School of Foreign Service, Georgetown University, April 1965.

[53] Id. at 120.

[54] Ordeal at Samar (Bobbs-Merrill) 1966.

On 28 September 19~~6~~01 at Balangiga on Samar in the Philippines, civilian Filipinos attacked without apparent reason or warning the American garrison. Out of 74 men and officers, 48 were killed. In retaliation, a battalion of Marines under Major L. W. T. Waller, USMC, was ordered by Brigadier General Jacob H. Smith, U. S. Army, to Basey on Samar. General Smith, also known as "Hell Roaring Jake," told Major Waller: "I want no prisoners. I wish you to kill and burn, the more you kill and burn the better you will please me."

In the course of his duties, Waller and a detachment of 50 marines undertook to march across the Southern part of Samar from Lanang in Basey through uncharted jungle. In consequence of starting without adequate rations, 12 men died and Waller himself wound up in the hospital at Basey. While there and running a high fever, it was reported to him that a number of the natives had behaved treacherously. Waller approved the recommendation that they be shot and 11 of them were shot accordingly and without trial. Waller reported to General Smith that "it became necessary to expend eleven prisoners." Major Waller was subsequently charged with and court-martialed for murder. While refusing to shield himself behind his physical condition at the time

he gave the order to shoot, Waller conducted his own "inadequate" defense but fortunately was acquitted by the court based upon a defense of obedience to orders, among other things. The Army court-martial was later held to be without jurisdiction and an attempt to retry Major Waller by a Navy court-martial was struck down by the Federal Courts in habeas corpus proceedings in 1915.

The importance of Major Waller's court-martial lies not in his original acquittal, <u>inter alia</u>, on the basis of his obedience to orders, but in the fact that he was tried for a violation of the laws of warfare relative to the circumstances at hand. It can be inferred that the victims were entitled to the status of combatants and commensurate treatment pursuant to international principles. They were not mere bandits, and had apparently achieved a status which demanded a more favored treatment.

As a final consideration, the status of <u>belligerency</u> is appropriate. When the elements of insurrection are manifest, a third state may legally proceed with <u>recognition</u> of belligerency. This is done by a declaration of neutrality which puts both parties in a civil war in the legal position of belligerents in relation to the <u>recognizing state</u>. The <u>rules of war and neutrality</u> apply and the insurgents acquire

in a limited sense, a status of international personality. Recognition by a third state is the key to belligerency.

Thus we have examined the various circumstances under which the rules of war, particularly quarter, would have application today. This brings us back then to the practical question of the warrior's dilemma, to kill or capture, and a critical analysis of the codified rules as they exist today.[55]

From an unsigned notebook of a German soldier the following lines were extracted:

> We destroyed eight houses with their inmates. In one of them two men with their wives and a girl of eighteen were bayoneted. The little one almost unnerved me so innocent was her expression. But it was impossible to check the crowd, so excited were they, for in such moments you are no longer men but wild beasts.[56]

Quite obviously the problem of eliminating the horrors of war is incapable of resolve, particularly during the passion of battle, by trying to outlaw it through impractical restrictions. Well intended though they may be, the delegates to international conventions cannot hope to ameliorate the sufferings of war by trying to legislate its practices

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[55] See Art. 23(c) and (d), Hague Regulations, cited above.

[56] Lavisse and Andler, German Theory and Practice of War (Paris, 1915).

out of existence. War often becomes more inhumane as the weapons become more sophisticated. Wherein lies the logic of a rule against "dum-dum" bullets, which says nothing of nuclear bombs or napalm? Such approaches are unrealistic and it is little wonder that modern military attitudes arose such as:

> Whoever uses force, without any consideration and without sparing blood, has sooner or later the advantage if the enemy does not proceed in the same way. One cannot introduce a principle of moderation into the philosophy of war without committing an absurdity. It is a vain and erroneous tendency to wish to neglect the element of brutality in war merely because we dislike it. . . .[57]

> Every means of war without which the object of the war cannot be obtained is permissible. . . . It follows from these universally valid principles that wide limits are left to the subjective freedom and arbitrary judgment of the Commanding Officer.[58]

As previously stated, the conventional rules of warfare dealing with quarter today contain no saving clauses, and the obligation to give quarter is imposed in the widest terms. But it had been for centuries a legal principle and realistic maxim of war that a weaker force forfeits all claims

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[57] Clausewitz, Vom Kriege (Vol. I) 4 and 5.

[58] The German War Book 64 (1914).

to mercy when it recklessly persists in defending a hopeless position against a superior force and when it refuses to accept reasonable conditions of surrender and undertakes to impede the progress of an enemy which it is unable to resist. Why then should the modern codified rule be so inflexible? Isn't the greatest good accomplished by the demand for surrender or else face the consequence of total forfeiture of all life in a situation where victory by the beseiged is hopeless and thus more lives are spared ultimately on both sides? I liken this to the decision former President Truman had to make to use the atom bomb at Hiroshima and Nagasaki, even though the estimate of potential loss of life to Japan was 100,000 plus. Wasn't it better to sacrifice 100,000 lives in order to save a million or more on each side by forcing surrender and ending the war abruptly, without having to invade Japan? Wherein lies the difference of forcing a surrender through the promise of certain death if the weaker enemy foolishly resists ultimate defeat? Such obstinance promotes a greater number of casualties to both sides.

The proponents of hard and fast rules concerning the conduct of war often raise the moral issues, but if there ever was an area where theologians disagree, it is here. There is, however, a common ground and that is that an injury

or potential injury will justify men in making use of force, both before and after it is committed.

> An injury justifies the use of force, before it is committed, in order to guard against it: and it justifies a like use of force after it is committed, in order, either to recover what is lost by it, or to hinder him, who has done it, from doing the like again. Now the use of force is war: and consequently the law of nature, since it allows the use of force for any of these purposes, allows war.[59] /Emphasis added/.

While I sympathize with the expression that the rules, although not qualified in their language, may be nonetheless subject to certain exceptions (*Cf*., section on reprisals *infra*), it is the business of burdening the accused with the proposition of having to affirmatively defend his conduct that is distressing.

Some proponents argue that it is only the ranking officials who will have to answer for so-called war crimes and the common soldier seldom, if ever, suffers such fate. I suggest that such is not the case, however, and there have been many courts-martial and other trials held on lower ranks for such offenses. Perhaps the plea of obedience to orders is not well taken when made by Generals,

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59. GROTIUS, *op sit* n. 14 § 1.

Admirals and Colonels who are supposed to "have known the situation" of illegal orders. But the problem arises with the unknowing soldier who, without mens rea, violated the laws of war pursuant to orders that had purported, without grounds, to justify the offense under the pretext of their constituting a reprisal for the enemy's crimes,[60] such as the infamous Commando order cited above. Added to this is the plea of necessity to obey the order, since such as the Commando order contained a threat of serious punishment in instances of noncompliance, including loss of one's own life. How much of this was decided at Nuremberg? According to August Von Knieriem[61] none of it was. In his excellent account of the war crimes trials he sums up this sorry situation thusly:

> Yet this judgment stands on a high level when one compares it with those rendered by British military tribunals. In Nuremberg the accused were high generals who could be supposed to have known the situation. But among those who were tried and sentenced by the British tribunals were privates who could not know with the best of intentions what the commando missions were doing and who had completely to rely upon the

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[60] See Dinstein, The Defence of Obedience to Superior Orders in International Law (Leyden, 1965).

[61] Von Knieriem, The Nuremberg Trials (1959).

information given to them by their superiors. This information was bound to imbue them with the feeling that the Commando Order was a lawful measure against treacherous murder, unsoldierly cruelty, and deceit. They could not even dream to do wrong in implementing it.

All the same, privates and policemen were convicted. Their cases illustrate the consequences of the opinion of the IMT that all acts committed by Germany's enemies were irrelevant, as well as of the superficiality with which the problems of the Commando Order had been treated in Nuremberg. A brief report of a few of these cases will serve to illustrate these consequences.

Nine men, for instance, were involved in the so-called Traudum Case. They were policemen and detectives transferred to the Security Service in the course of the war. One day in 1943 they received the order in Norway to take part in the execution of several men sentenced to death by a military tribunal. They then found themselves in front of several men, wearing sweaters or blue jeans, and shot them at the order of their SS Colonel (Hauptsturmfuehrer). Not until the war was over did they learn that the men shot had been members of a commando mission who, wearing civilian clothes, had been brought to Norway in a sailboat to blow up a factory. They also learned that there was no sentence of a military tribunal but that the procedure had been based on the Commando Order. All, including those who had done nothing but cordon off the place of

execution, were sentenced to 14 years imprisonment in a penitentiary.

Another German soldier was ordered to put the bodies into coffins and to remove them. He did not do anything else. He was sentenced to 15 years imprisonment in a penitentiary.

A driver had brought the burial command to the place of execution where the shot men were supposed to be buried. He was sentenced to 10 years imprisonment in a penitentiary.

In connection with the Commando Order, British military courts passed 14 death sentences which were also executed, 5 sentences of imprisonment for life, and 35 sentences of imprisonment totaling 350 years.

It cannot be known whether any of the legal problems discussed above were considered in any one of these cases. None of these military tribunals seems to have examined whether the defendants ought to have been acquitted because the Commando Order was not illegal or because at least it was not exclusively intended for criminal purposes, so that the soldiers had to implement it as a superior order, or because it was at least motivated in such a way that no soldier who had implemented it could have been conscious of doing wrong. Sad, indeed, have been the consequences of the Nuremberg methods of administering justice.[62]

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[62] Id. at 438-439.

It appears from an examination of the motives underlying the principles of quarter as laid down in the conventions, and from the obviously unjust sanctions imposed on the lowest privates as well as the highest generals for alleged violations of these principles, that the emphasis is placed in the wrong area. The written rules are too restrictive and their observance too impractical, if not impossible at times. There have been in the past recognized exceptions to the precept of quarter which were realistic and well founded, such as in the case of close and sustained combat, wherein quarter in actuality may be difficult to grant since an attacking body of troops is not subject to instantaneous control. Often many members of an enemy force will continue to shoot despite the fact that the order to surrender has been given. In such a case, quarter rightfully ought to be refused to those persons who continue to resist.

The example of denying quarter to a reckless, inferior enemy who is beseiged by a superior force as a means of forcing their surrender and thereby <u>saving as many lives</u> as possible by avoiding prolonged but useless resistance was cited above. Denial of quarter as a legitimate means of reprisal is discussed below. The illustration of these

cases, and others, which were the classical exceptions to quarter is made to emphasize the obvious shortcomings of the language of the Hague regulations. Lieber's Code may not have been a masterpiece, but it was a good beginning, and considerably more realistic than the current conventions and field manuals setting forth the so-called Laws of Warfare. Lieber spelled out the exceptions as well as the rule, and as a result his code, albeit imperfect, was capable of a more exact interpretation and understanding by the commander and the individual soldier.

There is no explanation in any of the reports of conferences held in conjunction with the Brussels Declaration or the Hague Conventions as to why the exceptions laid down in Lieber's Code were not incorporated into those documents. I suspect it was the French influence where the emphasis is on the codification of the so-called principle with little or no regard given to a codification of the exceptions. As noted above, this places the actor in the undesirable and sometimes fatal position of having to affirmatively defend his conduct if he is to get out from under the harshness of the uncompromising language. I have always felt that the ten commandments were necessary but dangerously understated. While it's true that "thou shalt not kill" might appear

obvious on the surface, it doesn't tell the whole story. It seems more precise and more preferred to command "thou shalt not wrongfully kill--or thou shalt not intentionally or negligently kill except in defense of person or property." It seems that a lot of the confusion and gross injustices demonstrated at Nuremberg and Tokyo could be avoided by providing flexibility in the language of the Laws of Warfare to take into consideration the exceptions. The idea of punishing soldiers for conduct in carrying out certain criminal orders, even though they themselves knew nothing of the circumstances and entertained no <u>mens rea</u> whatsoever, is repugnant. While war crimes trials may serve the ends of justice in some instances, I fear they all too often serve as nothing more than instruments of retaliation against a defeated enemy, and establish a dangerous precedent not justified in law or custom. A substantial reason for such miscarriages of justice, as noted in the cases of the commando order set forth above,[63] is the lack of flexible rules of war. While it is conceded that more definitive language relating to the Law of Warfare certainly won't prevent injustice per se, it surely would be a step in the right

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[63] <u>Ibid</u>.

direction. Not only would it aid the warrior to know the rules under which he must operate his grim business, but alleged violations of such rules would be easier to determine and their ultimate elimination from the conduct of war that much closer. I would like to think that we could eliminate war itself and thus the need for any rules of warfare would be automatically extinguished. Perhaps someday we will arrive at this ideal position, but until then, if we are to progress in the humanities of war, it will be by definitive rules. And by this I mean rules that take into consideration the realities of combat, and not those which are couched in such restrictive language that the proscriptions are impossible to follow.

IV. QUARTER AND ITS PRACTICAL APPLICATION VIS-A-VIS THE PRINCIPLES OF NAVAL WARFARE

In February 1966 the Secretary of Defense presented the annual defense budget to the House Committee on Defense Appropriation. Among other comments on current problems such as Vietnam, Mr. McNamara made a point that has almost gone unnoticed except for a few alert authors.[64] The Secretary commented, "There is one possible contingency which may require the large-scale employment of our naval forces; and that is a war at sea not involving any land battles." Thus was projected in a budget message for the first time since World War II the prospect of a 100% Naval war.

The notion of "a war at sea not involving any land battles," which saw fruition in the second World War, illustrates the need for certain rules or laws of naval warfare which are of necessity distinct in part from land warfare because of the very nature of ships and naval engagements. The nuclear-powered submarine, for example, will certainly create new naval tactics.

> It cannot only hide in the sea, as can
> any submarine, but it can stay hidden
> and continue to operate aggressively for
> virtually as long as its commander sees

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[64] See Eliot, Will the Soviets Provoke a War at Sea?, American Legion Magazine, November 1966.

> fit. It has unlimited (for all practical purposes) world-wide submerged endurance at high speed. Because it need not surface regularly, it cannot be detected visually from aircraft, or by radar--our deadliest tools against the German U-boats in WW2. It is a new, as yet untried but immensely formidable factor in sea warfare.[65]

New concepts in naval warfare were developed in the Second World War and have reached a point of considerable sophistication today with the Polaris missile. The following case is illustrative. On 14 May 1946, Captain Gunther Hessler, of the German Navy, was called as a witness in the trial of Admiral Karl Doenitz before the International Military Tribunal at Nuremberg, Germany. In reply to counsel's questions concerning certain practices of U-boat commanders during World War II, the following testimony was elicited:

> Q. Did your personal experience with torpedoed ships dispose you to caution with regard to rescue measures?
>
> HESSLER: Yes, The experienced U-boat commander was justifiably suspicious of every merchantman and its crew, no matter how innocent they might appear. In two cases this attitude of suspicion saved me from destruction.
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> This happened in the case of the steamer Kalchas, a British 10,000 ton ship which I torpedoed north of Cape Verde. The

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65. Id. at 12.

ship had stopped after being hit by the torpedo. The crew had left the ship and were in the lifeboats, and the vessel seemed to be sinking. I was wondering whether to surface in order at least to give the crew their position and ask if they needed water. A feeling which I could not explain kept me from doing so. I raised my periscope to the fullest extent and just as the periscope rose almost entirely out of the water, sailors who had been hiding under the guns and behind the bulwark, jumped up, manned the guns of the vessel--which so far had appeared to be entirely abandoned--and opened fire on my periscope at very close range, compelling me to submerge at full speed. The shells fell close to the periscope but were not dangerous to me.

In the second case, the steamer Alfred Jones, which I torpedoed off Freetown, also seemed to be sinking. I wondered whether to surface, when I saw in one of the lifeboats two sailors of the British Navy in full uniform. That aroused my suspicions. I inspected the ship at close range--I would say from a distance of 50 to 100 meters and established the fact that it had not been abandoned, but that soldiers were still concealed aboard her in every possible hiding-place and behind boarding. When I torpedoed the ship this boarding was smashed. I saw that the ship had at least four to six guns of 10 and 15 centimeter caliber and a large number of depth-charge chutes and anti-aircraft guns behind the bulwarks. Only a pure accident, the fact that the depth charges had not been timed, saved me from destruction.

It was clear to me, naturally, after such an experience, that I could

> no longer concern myself with crews or survivors without endangering my own ship.[66]

Captain Hessler's experience points up an interesting development with regard to naval warfare, and that is the use of ruses at sea and their acceptability as part of international custom. Had there not been a ruse employed in each instance, older customs of the sea would require the U-boat commander to grant quarter to the crews of the defeated vessels. In this frame of reference (viz changing concepts), as well as the situation of the possibility of 100% naval war, it is apparent that consideration of certain rules of warfare as they relate to naval operations is essential both as to their individual aspects and how they contrast significantly with rules relating to land battles.

A rule of quarter is undoubtedly easier to follow in naval warfare than with combat on land. Definite signals, barring ruses, indicating surrender are provided by customary law of the sea and by convention. There is none of the hard charging of bodies in the heat of battle which is difficult to stop and control as there is in land warfare. The momentum of a naval engagement is much easier to contain than is the combat assault of tanks and foot soldiers. Out of sheer

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[66] 13 I.M.T. 552 (1946).

necessity there are specialized rules of land, naval and aerial warfare which cannot be applied by analogy to each other. For example, stratagems or ruses of war are legally permitted in naval warfare, e.g., surprises, false or misleading messages and signals, use of the enemy's signals, use of dummy ships and aircraft, and the use of false flags, just to name a few. By way of contrast such false markings and related matters are strictly forbidden by custom in aerial warfare. The laws and customs of the sea are well established and the concepts of naval warfare although emerging have not been as quick to change as have been those of aerial and land warfare.

The customary law of the sea has been to withhold the firing on a belligerent ship who has struck the signal of surrender, and to rescue survivors under circumstances of urgency. The withholding of the fire upon receiving the proper signal is no doubt easier to do than it is on land, but the question of survivors often presents a bigger problem. The particular characteristics of the vessels concerned and the tactical mission at hand may make the collection of survivors impossible, such as with submarine warfare. The question of the survivors' ultimate rescue and return to another ship and ultimately to combat gave rise to the undoubtedly there are particular rules of land, naval and aerial warfare which cannot be applied by analogy to each other. For example, stratagems or ruses of war are legally permitted in naval warfare, e.g., surprises, false or misleading messages and signals, use of the enemy's signals, use of dummy ships and aircraft, and the use of false flags, just to name a few. By way of contrast such false emblems and related matters are strictly forbidden by custom in aerial warfare. The laws and customs of the sea are well established and the concepts of naval warfare although changing have not been as quick to change as have been those of aerial and land warfare.

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"Laconia Order" issued by the German U-Boat Command to the effect that:

> No attempt of any kind must be made at rescuing members of ships sunk. . . this includes picking up persons in the water . . . righting capsized life boats. . . handing over food and water. . . . Rescue measures contradict the most primitive demands of warfare that crews and ships should be destroyed.[67]

The order, when followed to its obvious ultimate, was held in Admiral Doenitz's case to be criminal and convictions in his case and others followed World War II.

The history of international law, particularly since the sixteenth century, is concerned to some extent about the limits imposed by law upon the conduct of naval warfare. Such questions are not always easy to interpret, particularly since most naval engagements do not take place within the territory of some international state, but rather occur in a sort of "no man's land" on the high seas. Let us then take a look at the issue of quarter in our consideration of the conduct of naval warfare.

The codification of the concept of quarter as a principle of customary international law was presented in the previous section.[68] The Lieber Code relating to instructions

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[67] 5 War Crimes Reports 238 (1948).

[68] Notes 33 and 34, supra.

for armies in the field did not deal with rules of naval warfare, but it had a definite impact on the evolution of such rules which we find codified today for use by the United States Navy.[69] Section 511C of NWIP 10-2 reads as follows:

> c. QUARTER. It is forbidden to refuse quarter to any enemy who has surrendered in good faith. In particular, it is forbidden either to continue to attack enemy warships and military aircraft which have clearly indicated a readiness to surrender or to fire upon the survivors of such vessels and aircraft who no longer have the means to defend themselves.[70]

Section 320b(11) of that publication declares a denial of quarter to be a war crime.[71]

At page 5-13[72] an interesting comment is contained in footnote 34 cited therein. The footnote refers to Article 23, paragraphs (c) and (d) of the Hague Regulations, but then goes on to qualify the Hague Article with the following afterthought:

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[69] U. S. NAVY DEPARTMENT, PUBLICATION, NWIP 10-2, LAW OF NAVAL WARFARE (U) 1959, hereinafter referred to as NWIP 10-2.

[70] *Id.* at 5-7 (Change 2).

[71] *Id.* at 3-5 (Change 2).

[72] NWIP 10-2.

"However, quarter can be refused when those who ask for it subsequently attempt to destroy those who have granted it."[73] (Emphasis added.)

What distinguishes the Navy's approach to the seemingly inflexible rule set down by the convention as opposed to the Army's approach in FM 27-10, The Law of Land Warfare, is the inclusion of another of the classical exceptions to the rule of quarter. I do not mean to imply that this status of one upsmanship makes the Navy's publication any better than the Army's, since both manuals are deficient to some degree and there has been considerable resistance to proposed changes to the so-called Laws of Warfare by both services in the past decade. This is regrettable since certain principles of warfare have become outdated since World War II, and we are facing a new enemy instilled with new concepts and ideologies, such as are the Viet Cong and North Vietnamese Regulars, and we find ourselves equipped with new and sophisticated weapons such as polaris and intercontinental missiles and the potential of interplanetary missiles. Times change and needs change, including the needs of war, both offensive and defensive. The Hague Conventions are more than a half century old. Geneva

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73. Id. at 5-13 (Change 2).

is almost twenty years behind us. We encounter today a new and dangerous enemy, who neither wears a uniform,nor respects any of the customs that do not suit his convenience. Part and parcel with his "military" tactics go the weapons of terror and fear, which include the killing of hapless village chiefs and the bombing of crowded theatres and restaurants filled with civilians.

As discussed later in the area of aerial warfare, there are antiquated articles of the Hague Regulations which were never formally revoked, but out of sheer necessity, as the concepts of aviation as a weapon expanded and bombardment of certain areas became essential notwithstanding that civilians would be killed, those articles became meaningless. Technically, many thousands of airmen on both sides were guilty of violations of the Hague articles relating to such warfare,[74] but none was tried as a war criminal for such commonplace occurrences for obvious reasons. What I am suggesting is a realistic approach to the rules relating to the conduct of war, which will make such rules flexible enough to be adapted to the changing times and changing needs.

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[74] 74. Art. 25, Hague Regulations, "The attack by bombardment by whatever means, of towns, villages, dwellings or buildings which are undefended, is prohibited."

Generally speaking, the modern rule in naval warfare is that enemy shipping which is engaged in the war effort, whether it be merchant or warship, may be sunk on sight, but once the attack or assault is over and no further violence is necessary, such as upon a signal to surrender if not a ruse, then quarter must be granted. The captain of a German surface raider was tried as a war criminal for his prolonged attack on a British merchantman after she had indicated surrender.[75] After several minutes of heavy fire from the German raider, the British ship stopped her engines, acknowledged the attacker's signal not to use her radio and raised an answering pennant. Notwithstanding the German continued to attack for fifteen minutes and inflicted a number of casualties on the British crew who was abandoning the ship. In another charge, where the signal was not one of <u>unequivocal surrender</u>, but rather merely an indication that the ship was sinking and that the captain and crew were abandoning ship, the court held that continued firing was permissible and not a war crime.[76] How this reconciles with Article 23, paragraph (c) of the Hague Regulations I do not

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75. <u>The Trial of Von Ruchtechell</u>, 9 War Crimes Reports 82 (1948).

76. <u>Ibid</u>.

know, since the sinking vessel was obviously hors de combat at the time of her so-called equivocal signal.

The circumstances where an unqualified rule cannot be applied are not as plentiful in naval warfare as in the area of land warfare, but the classical exceptions cited in the previous section are as applicable to war at sea as on the land. The moral issues are interesting, but as with the foot soldier, the sailor will find that theologians hold as many opinions about war at sea as they do about combat on the shores.

Most writers categorize the basic principles of the Law of War into three concepts--military necessity, humanity and chivalry. But the essence of these principles is contained predominantly in the principle of military necessity. As Dr. Francis Lieber states in his classic work:[77]

> Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war and which are lawful according to the modern law and usages of war.[78] (Emphasis added.)

The humanitarians, however, all too often tend to look exclusively at the horrors and sufferings of war and in their

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[77] General Order 100, Instructions for the Government of Armies of the United States in the Field.

[78] Id. Art. 14.

myopia fail to allow for the necessary conduct that is essential to arrive at the ends for which the war is being fought. By inflexible conventions they defeat their own purpose and the rules are more honored in their breach than practice. There are justifiable circumstances under which quarter ought to be denied at sea as well as on land, such as, ruses and strategems where quarter is asked and then resistance continues, reprisals and retaliations, *infra*, and cases of military necessity where no other *reasonable* alternative is available. The United States Navy has made a half-hearted attempt to qualify the rule in its publication[79] but even this "code" falls short and leaves something to be desired in the area of a more flexible set of Laws of Naval Warfare.

In this regard it is appropriate to note the precise language of a portion of the judgment of the International Military Tribunal, Nuremberg, Germany (1946) in the case of Admiral Karl Doenitz:[80]

> In view of all the facts proved and in particular of an order of the British Admiralty announced on the 8th of May 1940 that all vessels should be sunk at night /by submarines/ in the Skagerrak,

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[79] NWIP 10-2.

[80] 6 F.R.D. 69 (1946).

> and the answers to interrogatories by /Fleet/ Admiral Chester M. Nimitz, U. S. Navy that unrestricted submarine warfare was carried on in the Pacific ocean by the United States from the first day that nation entered the war, the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare.[81] (Emphasis added.)

This must certainly rank as one of the most significant anamolys of the judgments that followed World War II. Doenitz was charged, inter alia, with waging unrestricted submarine warfare contrary to Naval Protocol and International Law and Custom. He was found guilty thereof by the Court, but he was not sentenced therefor because the same "breaches" (i.e. war crimes) were ordered and committed by the nations which sat in judgment on him. With this kind of logic, I do not doubt that former President Truman was relieved in more than one respect by the fact that the use of the atomic bomb helped the allies to "win the war for his side." I use the Doenitz case to illustrate the futility of attempting to set down a set of invariable rules of war. It is ludicrous to condemn Admiral Doenitz for applying the principle of military necessity to the waging of unrestricted submarine warfare, while at the same time accepting it as a hard fact of life from our

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81. Id. at 169.

admirals. No one has a greater reverence for the memory of Fleet Admiral Nimitz than I, since it was my pleasure to know and study this great naval officer personally. I find nothing wrong with his decision to wage unrestricted submarine warfare from the first day the United States entered World War II, and it is an absurdity to find Doenitz guilty of the same and hold it to be a war crime and then to mitigate his so-called guilt by awarding no sentence as to this "crime" simply because we did it too. The thing speaks for itself, as to the futility of inflexible so-called Laws of War.

V. QUARTER AND ITS PRACTICAL APPLICATION VIS-A-VIS THE PRINCIPLES OF AERIAL WARFARE

The concept of aviation as a weapon is quite sophisticated today in spite of its brief existence. Since aircraft is not much more than sixty years old, it is amazing how it has developed into a sleek, complex machine that can be as deadly as it is beautiful. One of the most brilliant, and certainly the most noted, authorities on war law relating to aircraft, J. M. Spaight, LL.D., wrote as long ago as 1914 when aviation was barely out of its infancy, a fine summary and prognostication of aviation as a weapon to the effect:

> The fighting aircraft has, beyond all question, arrived and come to stay. The extraordinary development of the power-propelled aeroplane. . .within the last few years, has removed the question of aerial war from the subordinate place. . . and has given it a prominence and importance which demand for it special consideration and independence as a domain of war law. . . . [T]he science of war and the science of flight have in our days formed an alliance which will. . . endure as long as war itself. . . . All the questions connected with the use of aircraft in war are new and constantly changing with the progress of flight. The variation in the efficiency of flying craft and their capabilities necessarily affects the finality of any rules which are proposed for application to them. . . . To question the legitimacy of the use of aircraft in war is

> simply to plough the sand. The jurists who demanded total prohibition of the new arm . . . were treading on the same futile path as the Pope who issued the bull against the comet.[82]

To recount the fascinating history and development of the airplane as a weapon would be lengthy and regrettably would impose an inappropriate burden to this thesis. Consequently, the glories and frustrations, the thrills and anguish of combat and death in and from the skies must of necessity be left to another time. It is enough to note that the airplane, the rocket and the missile are here to stay. Aerial warfare is a hard fact and as long as men war against each other, they will do so from the air. What was little more than a Buck Rogers fantasy a scant twenty-five years ago is reality today. The issue then is not whether aerial warfare, as a whole, is lawful, but under what circumstances can, and must, it be limited in its application. The total answer to this covers a broad spectrum of air war and the law and is beyond the scope of this thesis. I, therefore, limit the consideration to the principles of aerial warfare as they relate to a practical application of the concept of quarter.

The second world war witnessed a marked deterioration in the standard of good manners and chivalry in the air that

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[82] Spaight, Aircraft in War, 1-3 (1914).

had been set in World War I. The basis of this comity and chivalry was in custom and usage, and not in the law itself. When aircraft were first employed as weapons, there was a reawakening of the old knightly chivalry that pervaded Europe hundreds of years ago. An American pilot wrote in World War I:

> It is natural that the chivalric spirit should be strong. Even the Boche, treacherous and brutal in all other fighting, has felt its influence, and battles in the air with sportsmanship and fairness. . . . There is mutual respect and exchange of civilities much as there was between opposing knights.[83]

The many interesting accounts of these chivalristic attitudes are contained in other excellent works of J. M. Spaight.[84] It is regrettable that the spirit of honor that prevailed in the early development of aircraft as a weapon did not carry over to modern times, but as the times changed, so did the attitudes. Out of sheer military necessity, the employment of the airplane as a destructive force broadened and the attempts to regulate its use, such as Article 25, Hague Regulations of Warfare of 1907 as mentioned above,[85]

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83. Lieut. B. A. Molter, Knights of the Air, p. 21 (1918).

84. Air Power and War Rights (3 editions, 1924, 1933, 1947). All of Spaight's works are brilliant and comprehensive, and are highly recommended to anyone interested in the science of flight and the laws of war. They virtually cover every aspect of this fascinating field to date.

85. See note 74, <u>supra</u>.

not only fell into oblivion, but were shown to be so patently misguided that no question of their application as the basis of a war crime was ever raised in World War II. Thus today we find that in modern war, chivalry has ceased to count in the air as well as on land and sea. War today is a grim and serious business. There is no room for courtesy and even though the humanitarian has attempted to mitigate and ameliorate the horrors of war, such considerations came from sources other than the attitudes of knightly chivalry. Air fighting has now become a general thing. Bombs, rockets, and missiles are often fired upon targets seen only on radar screens high above cloud cover. Personal encounters between aircraft are becoming more and more rare. The day of the old fashioned dogfight is gone. Jets and air-to-air missiles are impersonal and unerringly accurate. The side winder missile is a brilliant weapon, but because of it the famous Immelmann maneuver used so often to evade another attacking aircraft may be a thing of the past.

From all of this came a new attitude about the concept of quarter. The circumstances of the aircraft in extremis were new and no customary law of the air was available to answer the problems. Certainly it would be chivalrous not to continue to attack a disabled machine, but while it is true that the so-called laws of war forbid the killing of an enemy

who has no longer the "means of defence,"[86] that prohibition is coupled with the important qualification that the enemy has "surrendered at discretion."[87] There is no obligation to cease firing upon an enemy airman whose machine has been disabled, nor does it make a whole lot of sense to allow him to escape and live to fight another day. Certainly if he is over your lines and capture is imminent upon his landing or crash, it might be argued that he should be allowed to live. But the variables here are obvious and the question is too close to justify any disregard of military necessity. Cessation of the attack is unnecessary and there is no obligation to cease fire and grant quarter. This is another obvious exception to the hard rule and, although not an ancient one, it certainly is classical among aerial warfare.

The interesting aspect of the relationship between aerial warfare and quarter is that the Hague Conventions were written before the airplane was developed as a weapon. Thus the attitudes expressed in those conventions relating to the law and customs of war were more concerned with land and naval warfare and at best the aspect of bombardment from lighter than air

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[86] See Article 23, Hague Regulations.

[87] Ibid.

balloons. Naval gunfire was the primary consideration as far as bombardment was concerned[88] and the humanitarian aspects of quarter were generated from these limited experiences on land and sea, without too much consideration being given to the awesome weapon that would soon fill the skies. It is further worthy of note that the Geneva Conventions contain no mention of qualifying or enhancing these laws codified in the earlier conventions. Also subsequent Declarations[89] and Conventions[90] and Commissions[91] are worthy of note as efforts made by the civilized nations to develop rules of aerial conduct, but none has been formally adopted and do not control today either as customary or codified International Law. The fact that these resolutions have not become International Law does not mean, however, that there are no governing principles with respect to aerial warfare. An examination of the practical aspects is better suited to the development of this thesis, since aviators are not as

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[88] Article 2, Hague Regulations.

[89] Paris (1919).

[90] Havana (1928).

[91] Commission of Jurists meeting at the Hague (1923) appointed by resolution dated February 4, 1922, at the Washington Conference on the Limitation of Armaments to study, <u>inter alia</u>, proposed limitation on the use of aircraft as an agency of warfare.

encumbered by the so-called laws as are the soldier and sailor, and it is easier to understand and accept the fact that in aviation it is rarely possible to give quarter. As a famous French ace of World War I said in his accounts of combat aviation of that war,[92] "In aviation there is more often no alternative but victory or death, and it is rarely possible to give quarter without betraying the interests of one's country."[93]

What occurs is a life or death struggle in the air and the enemy airman cannot surrender by holding up his hands like a soldier on the ground can. Clearly disabled aircraft may still be in a position to fight and often do.[94]

A German pilot was killed by another French ace, Guynemer, and as the Frenchman followed the falling aircraft to confirm the kill, he found himself in the midst of a hail of bullets being fired from the plane by the German observer who was still alive in the two seater aircraft. Guynemer says:

> I must admit that it was a fine act for the observer, knowing that he would soon

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[92] Fonck, Mes Combats (1920).

[93] Id. at 133.

[94] Consider the many cases of Japanese Kamikaze planes in World War II, and the deliberate crashing and ramming of aircraft against other planes and enemy installations in both world wars.

> be a mass of quivering bones and flesh
> crashed on the ground, to try to take
> with him to death the enemy who sent
> him there.[95]

The great German ace von Richthofen described in Der Rote Kampfflieger[96] how he spared an English airman whose plane was on fire. He followed him down and landed near him. After they had landed, the Englishman told von Richthofen how he had tried to fire on him during the descent but that his machine gun had jammed. Richthofen complains, "I gave him quarter; he profits by it and rewards me afterwards by a treacherous shot."[97] Many such cases give evidence to the difficulty of sparing a disabled aircraft in the air. The attacker cannot be bound by any rules of war to cease firing upon the machine. The whole purpose is to destroy it and the pilot so as to achieve the end of the combat. To the humanitarian this may seem ruthless, but it would be illogical to pretend that it would be in keeping with the objectives of war to cut short the attack simply because you had your adversary at a disadvantage. It is possible for a disabled aircraft to land without further damage to

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95. Mortane, Guynemer, The Ace of Aces, 117-119 (1918).

96. pp. 108-9 (1920).

97. Id. at 109.

itself or its occupants. Wherein would be the logic of making war and then stopping short of the ultimate solution to the matter by failing to finish off your adversary who is not in a position to surrender at his discretion nor to be taken prisoner?

While surrender in the air is virtually impossible, and there is no need to break off the attack on a disabled aircraft, there is the possibility of a surrender of _ground forces_ to attacking aircraft by means of displaying signals of surrender such as a white flag. The suspension of attack is somewhat impractical, however, since it is usually impossible for the attacking flyers to take and hold the ground troops prisoners. The initial difficulty lies in the fact that today's aircraft moving equal to and often twice the speed of sound are not in a position to recognize the white flag or other indications of surrender, but the problem that arises with surrender of ground troops to attacking aircraft goes beyond the inability of the flyer to recognize the signals. Often there are no ground forces at hand to take control over the potential prisoners, and there is always present the possibility and probability that the "surrender" is no more than a ruse to "enable the enemy troops to escape after the immediate danger is past."[98]

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[98] Spaight, Air Power and War Rights (3d ed) 132 (1947).

There appears to be no reason why such indication of surrender may not be disregarded and the attack continued. I admit this appears to fly in the face of the proscriptions of Article 23 of the Hague Regulations, but quite obviously this can be and is justified under the rule of military necessity and is an exception to the conventional rule. This is not to say that surrender of ground forces, and naval forces for that matter, to attacking aircraft is not sometimes feasible. Examples from World War II can be seen of the capture of an entire fortress[99] and a submarine[100] upon surrender to the planes and ultimate capture by close by friendly forces and vessels. These are exceptional cases, however, and it appears that the logical and better rule is that which allows the attack to be continued out of necessity rather than to break off and allow the enemy to escape when no assisting ground forces or vessels are at hand.

The logic which allows the continuation of the attack on disabled aircraft carries over to legitimize such attack

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[99] General H. H. Arnold reported to the Secretary for War in 1943 that "the garrison of the Spadillo airport (at Pantellaria), placed a white flag on the ground. . . /and/ for the first time in history a fortified position of great strength surrendered directly to an air force."

[100] Gordon, I Seek My Prey in the Waters, 165-7 (1943).

on an opponent and his aircraft landed behind his own lines or in other grounds friendly to him. The fact that the crashed airman "holds up or waves his hands is immaterial; the attacker is justified under the laws in killing him."[101] The matter is not as clear cut when the aircraft is forced down in the attacker's territory and the enemy airmen do not continue to resist or try to escape. Under such circumstances there would have to be justification on the part of the attacker to kill his foe who is now hors de combat and in no position to escape. The fact that the airmen were downed is not the controlling circumstance. It is the fact that they were downed at a time and place in which they are certain to be captured that makes the difference. Only under these exceptional circumstances would it be criminal to kill them. Thus, the usual rule should be permissive and only the "exception" proscriptive, rather than the converse. A natural sequitur of all of this is the obvious conclusion that an airman may still be attacked at any time that he continues to resist, however, ineffectively, and notwithstanding that his aircraft has crashed or is otherwise disabled. Resistance of any form calculated to avoid capture, to effect escape or otherwise deny the attacker his ultimate objective, constitutes

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[101] SPAIGHT, op. cit. n. 98 at p. 135.

a waiver of any right to quarter. The downed airman is no different than any soldier on land and he can expect to be treated the same in the event of resistance. In October 1966, the following quote appeared in an article in the New York Times, dateline Thonaonham, South Vietnam:

> It was an unusual day as Foxtrot Company of the Second Battalion, Fifth Marine Regiment, patrolled in strength along the southern boundary of the demilitarized zone which divides North and South Vietnam.
>
> The leading element of the Third Platoon captured one enemy prisoner but they killed him when he violently resisted capture by nearly biting off a Marine's thumb and sinking his teeth into the back of another Marine's hand.[102]

The action of the United States Marines in this case speaks for itself, and the same consequences can be expected by any member of the enemy forces who offers such resistance, whether he be an infantryman, sailor or airman. Resistance need not consist of trying to escape or trying to kill one's would be captors. It can consist of simply trying to burn a downed aircraft or an immobilized tank or artillery piece, or in trying to scuttle one's ship. The example of the downed airman attempting to burn his machine after a crash

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[102] Reprinted in the San Francisco Chronicle, 17 October 1966.

is most illustrative. Killing him after he has come down in enemy ground is justified under the circumstances, and he is considered as continuing to resist as long as he tries to avoid not only his personal capture, but the taking of his machine. Although this may appear to conflict with the duty of the crashed airman to destroy his airplane under such circumstances, it is justified as an equal duty on the part of the enemy airmen or other military personnel to prevent him from destroying it, and to kill him if necessary to so prevent him.

From all of these examples, it can be seen that the application of fundamental principles of law to aerial warfare is difficult at best because of the enlargement of the scope of and the changes in the character of modern war. It is noted in this regard that rapid advances in modern war have a tendency to obliterate the old distinctions such as between combatants and non-combatants (herein consider the atom bombs dropped on Hiroshima and Nagasaki). The second world war saw a significant departure from old customs and prohibitions relating to aerial bombardment, which were figuratively blasted into oblivion by both sides. From tactical bombing came strategic bombing and then on to target-area bombing, i.e., "destroying large areas containing, but not confined to, centres of production of munitions,

of other articles of vital importance for the conduct of war such as oil, and of centres of communication."[103] And finally came the V-2 rockets and atom bombs.

Lauterpacht suggests in his Seventh Edition of Oppenheim's International Law that:

> It is a moot point whether the general recourse to strategic target-bombing had the result of endowing it with a measure of legality and of abolishing--or showing obsolescence of--the principles underlying the [proposed] Hague rules of 1923 [related to the limitation of the aircraft as an agency of warfare].[104]

It is suggested by that authority that the fact that no conviction was recorded on any charges before the International Military Tribunal at Nuremberg in this regard "need not necessarily be interpreted as indicating that in view of the tribunal such bombing was not illegal, but is merely compatible with the explanation that since both sides pursued this method of warfare, neither was going to be held responsible."[105] To this I can only say nonsense. According to that reasoning although two wrongs still don't make a right, if each side does it, then, wrong or not, it is a good defense. This is

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[103] House of Lords Debates, vol. 130, col. 753.

[104] Lauterpacht, p. 529.

[105] Ibid.

as asinine as the refusal of the tribunal to sentence Admiral Doenitz for the so-called war crime of waging unrestricted submarine warfare, even though found guilty thereof, simply because the United States and British had done the same thing. The obvious answer is that not only was the strategic target-bombing not illegal, but it was totally justified pursuant to military necessity. Former President Truman is no more a war criminal than is any other commander who orders the employment of new techniques, weapons and concepts in modern warfare, so as to attain the maximum result at the least cost in men and material. The humanitarians who think they can outlaw war by voting against it take the wrong turn in the road to world peace in this regard. While it may be true that their hopes may be realized when men realistically accept their aims, it won't be through their methods. A rational approach to the end of war is through an acceptance of the changing concepts, and an intelligent appraisal of the futility of war as an instrument of policy. When we adjust our international thinking in line with the awesomeness of modern nuclear war, we will discover that outdated rules and the vengeance of the "victors" sitting in judgment on the losers have not deterred one bullet or one bomb. Nuremberg may serve as a deterrent against notorious gas chambers, but it won't stop another World War no

matter how much we would like to think that such "judgments" aid the cause of peace. And as for rules of war, let's face it--no restrictions adversely affecting a state or group of states as a whole have ever been placed on warfare. The only restrictions affecting the action of belligerents were limited to practices of equal convenience to both sides and at that they were worded so poorly as to find them more honored in breach than in observance. Aerial warfare is here to stay as long as men in their weaknesses will not live in peace. The legal principles of land and naval warfare are antiquated in part in themselves, and it is obvious that the application of them to the rapidly changing face of combat in and from the air, and perhaps outer space, would be difficult, if not ludicrous.

The Navy's publication governing the Law of Naval Warfare[106] points up the futility of any attempt in this regard. Paragraph 250 begins with the pronouncement:

> There is no comprehensive body of laws specifically applicable to air warfare in the same sense that there is a comprehensive body of specialized laws relating to sea warfare and a similar body relating only to land warfare.[107]

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[106] NWIP 10-2.

[107] Id. at 2-7 (Change 2).

This is a precise statement of the status of things to date, and had the Navy quit there, it would have been reasonable. But the author of the paragraph plunged on and said:

> There are, however, certain customary and conventional rules of a general character underlying the conduct of war on land and at sea which must be considered equally binding in air warfare. In addition, there are certain specialized laws of sea and land warfare which may be considered applicable to air warfare as well.
>
> This book applies to the whole of naval warfare and thereby includes naval air warfare. Appropriate note is taken throughout this book of the situations in which the specialized rules of naval warfare do not similarly regulate the conduct of naval air warfare. In the absence of these distinctions, operational naval commanders are to assume that the rules regulating warfare at sea are equally applicable to naval air warfare.[108]

This additional language is not only dogmatic, but generally without foundation. Only one footnote to that paragraph attempts to explain the circumstances under which the land and sea rules are allegedly applicable to naval air, but it falls far short of a justification for the unprecedented and nonjudicious use of language. It is obvious that the specialized rules of land and naval warfare could

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[108] Ibid.

rarely be applicable to aerial war and any such application would be by exception rather than standard practice. The paragraph is misleading at best and if taken literally is dangerous. It appears after all this that the author had second thoughts about his generalizations and attempted to mitigate some of the dogmatism in another footnote to the paragraph wherein he says:

> Caution must be exercised in indiscriminately attempting to apply 'by analogy' these specialized rules of land warfare [sic] to air warfare. The peculiar conditions of aerial warfare have occasional practices unique to this form of warfare. Consequently, the attempt to apply 'by analogy' the specialized rules of land and sea warfare [sic] to air warfare may lead frequently to a disregard of these practices and, to this extent, be quite misleading. For example, the distinctions made between legitimate ruses and forbidden perfidy are different in land and naval warfare. Yet neither the distinctions made in land warfare nor the distinctions made in naval warfare have been in accordance with the practices of air warfare.[109]

Although well intentioned, it is apparent that the Navy's publication lends nothing to a genuine codification of the laws of aerial warfare, and the attempt to provide for certain rules by analogy is misleading to the airman and fraught with danger. What is actually needed is a complete re-examination

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[109] NWIP 10-2 at 2-10 (Change 2).

of all of the customary principles and then a codification which is not simply a general restatement of the law but a new and realistic pronouncement of flexible rules, adaptable to modern conventional and atomic warfare.

of all of the customary principles and then a codification which is not simply a general restatement of the law but a new and realistic pronouncement of flexible rules, adaptable to modern conventional and atomic warfare.

[illegible]

> [illegible]

[illegible]

[illegible]

VI. DENIAL OF QUARTER AS A MEANS OF REPRISAL

Reprisals are acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by a belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the laws of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.[110] Thus, by definition, "reprisals" in war are the commission of acts which, although illegal in themselves, may, under the specific circumstances of a given case, become justified because the guilty adversary has himself behaved illegally. The action may be taken as a last resort, in order to prevent the adversary from acting illegally in the future. The first determination, therefore, is that the enemy has behaved in an illegal manner, and the next is that all other reasonable means of securing your enemy's compliance with the laws of war must be exhausted before resort may be had to reprisals. In this sense, reprisals do not have to be undertaken against the precise law breakers, but there must be some close connection between the victims of the reprisals and those persons who acted illegally in the first instance

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[110] FM 27-10, para 497.a.

and their acts so as to constitute a joint responsibility. As a result reprisals are never supposed to be adopted for revenge and are designed solely to induce the adversary to refrain from illegal practices. The actual form of the reprisal need not conform to those illegal acts committed by the enemy, but it should not be excessive in the degree of violence.

Positive rules of law on reprisals are extremely rare in municipal law and completely absent in modern international law. Article I, Section 8, paragraph 11, of the United States Constitution contains a rather obsolete rule of law on reprisals to the effect that Congress may declare war, and also "grant letters of marque and reprisals." But in the sense that reprisals are employed in modern warfare, the ancient language in our Constitution, "grant letters of. . . reprisals," is without function today. Thus, since we do not find a codification of the rules relating to reprisals, we must look to the customary law for interpretations.

The initial consideration then is that "reprisals" (both short of war, viz pacific blockade, and those in war) are lawful, if and when conducted under appropriate controlled circumstances and conditions. The precise form that we are interested in is "denial of quarter" as an act of reprisal. Keeping in mind the definition, that is the doing

of an otherwise illegal act to prevent an adversary from continuing illegal conduct and to enforce his compliance with the laws of civilized warfare, we can see that Article 23 of the Hague Regulations of Warfare does not provide for reprisals as an exception to the rule of quarter. And yet reprisals are legally acceptable concepts and are a survival of the jus talionis - i.e., an eye for an eye, a limb for a limb, a life for a life. If the enemy resorts to illegal conduct, such as a denial of quarter, then a denial thereof in return is permitted by way of reprisal.

It is said that reprisals are the saddest necessity of war, but the comment speaks for itself. Reprisals are permitted by the law of war (jus in bello) and arise out of strict necessity. They equalize the position of the victim of an illegal act with that of the aggressor. There have been abuses of the right of reprisal in recent wars, but these abuses generally lay in the area of failure to observe certain criteria laid down for their employment, to wit:

(a) no other sanction or means of inducing a return to lawful behavior is available;

(b) the reprisal is proportionate to the antecedent illegal act;

(c) the reprisal is made on proper authority.[111]

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[111] See McDougal and Feliciano, Law and Minimum World Public Order, 679-683, 1961.

The law is not clear as to retaliation in kind and the use of what weapons would be prohibited in retaliation. There are certain restrictions such as reprisals against prisoners of war,[112] or upon non-combatants[113] or the taking of hostages,[114] but there is no restriction per se as to denial of quarter as a form of reprisal for a denial of quarter. The criteria mentioned above are those generally commented upon by leading authorities in International Law, but I hasten to add there is no universal agreement on the conditions that must be met in order to invoke the doctrine. This point was clearly illustrated in a discussion carried on before the International Military Tribunal at Nuremberg between the U. S. Chief Prosecutor, Justice Jackson, and Professor Dr. Franz Exner, one of the German defense counsels. In reply to some rather sweeping generalizations made by Justice Jackson as to the doctrine of reprisals, Dr. Exner commented:

> For ten years I have lectured on International Law at the university and I believe I understand a little about it. Reprisals

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[112] GPW, art. 13; GC, art. 33.

[113] GPW, art. 87; GC, art. 33.

[114] GC, art. 34.

> are among the most disputed terms of international law. One can say that only on one point there is absolute certainty, namely that point, which Mr. Justice Jackson mentioned first--'measures of reprisals against prisoners of war are prohibited.' Everything else is matter of dispute and not at all valid as International Law. It is not correct that it is the general practice in all states, and therefore valid international law, that a protest is a prerequisite for taking reprisals. Neither is it correct that there has to be a so-called reasonable connection. It was asserted that there must be a relation as regards time, and above all a proportionality between the impending and the actually committed violation of International Law. There are scholars of International Law who assert, and it is indeed so, that it would be desirable that there be proportionality in every case. But in existing International Law, in the sense that some agreement has been made to that effect or that it has become international legal usage, this is not the case. It will have to be said therefore, on the basis of violations of International Law by the other side, that we under no circumstances make a war of reprisals against prisoners of war; every other form of reprisals is, however, admissible. . .[115]

Notwithstanding that the question is not easy to resolve and international scholars differ as to the criteria

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[115] 9 I.M.T. 325 (1948).

that must be met, there is no indication in any of the conventions that a denial of quarter may not be employed as a reprisal against an enemy who himself denies quarter in violation of the laws of war. The Geneva Conventions are completely silent as to this aspect and limit considerations to possible reprisals against prisoners, and other persons who have fallen into the hands of the enemy as well as noncombatants and hostages. The Hague Regulations contain an article that might limit such conduct, but it does not proscribe it except under certain circumstances.[116] What we are faced with is the fact that reprisals belong to that small class of measures which enable warfare to be kept within legal limits and they may thus be said to be a kind of sanction for the laws of war. Regrettably the rules concerning reprisals belong for the most part to customary law and are truly ambiguous as can be seen from the foregoing differences of scholarly opinion. The doctrine is fraught with great disadvantages and like any policy it is vulnerable to abuses. The point of this thesis, however, is not to critically analyze the doctrine as a whole, but rather to

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[116] Article 50 of the Hague Regulations states: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

illustrate another classical exception to the concept of quarter, wherein quarter may be legally denied notwithstanding the deficiency of the language of the so-called laws of war. The dangers and disadvantages of the use of reprisals are important to note, however, and should be borne in mind when consideration is given by the commander to the decision to deny quarter as a measure of reprisal against a guilty enemy. Erik Castren, LL.D.,[117] of the University of Helsinki, sums up the matter in his excellent work on the laws of war[118] as follows:

> Great disadvantages attach to reprisals. Belligerents are often too anxious to resort to them even when the illegality of the enemy's action is far from clear. There is lack of objectivity here too. If the other party considers that it has not transgressed the permitted limits of warfare, still more severe counter-reprisals will follow, and this continues until there is little or no restriction left upon warfare. As was seen during both World Wars, belligerents often rid themselves of inconvenient rules under the pretext of reprisal. It has often been suggested that the use of reprisals should be either entirely forbidden or at least considerably limited. As, however, measures of reprisal often offer

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[117] Professor of International and Constitutional Law.

[118] Castren, The Present Law of War and Neutrality (Helsinki), 1954.

> the only effective means of defence against an enemy who disregards the restrictive laws of war, their prohibition would serve no useful purpose in spite of these disadvantages. If a decision to resort to reprisals could be submitted in advance to some neutral body for approval and this body could also supervise their application, a considerable advance would have been made. But there is little chance of establishing a system of this kind.[119]

What it reduces to is the obvious fact that we are a long way from total peace and an end to all war. Until that time, men will continue to make war and in this context it is apparent that "until a comprehensive, centralized, and effective sanctions process is achieved in the world arena, belligerents have to police one another and enforce the laws of war against each other."[120] These legal measures of reprisal may justifiably and quite logically consist of a denial of quarter. I seriously question if a more effective means can be employed to enforce a reasonable rule of quarter on the part of one's adversary than to deny any quarter to him in the event of his misconduct in this regard. It was a barbaric notion that was contained in the old phrase "ask no quarter and give no quarter," but in actual practice, the

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[119] Id. at 72.

[120] McDougal and Feliciano, op. cit. supra note 95, at 681.

belligerent who knows he will receive none, if he gives none, soon departs from his dogmatic position. Under such circumstances (i.e., an unreasonable denial of quarter on his part), it is legal, moral and quite obviously logical to deny quarter to the offender, in return, as a measure of reprisal. The conventional and codified laws of war should be redrafted to so provide and to remove any ambiguity that presently exists because of deficiency in language and doctrine.

VII. CONCLUSIONS

Although of necessity the examination of the principles of quarter has been brief, I believe the significance of the practicalities vis-a-vis the present rules has been demonstrated. Historically the concept of quarter has evolved into an unrealistic codification of a principle that has not kept pace with modern warfare. I do not take issue with the reasonable efforts of statesmen to ameliorate the horrors of war, but I cannot sympathize with their failure to recognize the obvious fact that methods of warfare, as long as war remains with us, are an expanding thing and to attempt to place impossible restrictions thereon creates rather than cures problems. Someday our descendants may see an end to war, but I doubt that our present generation will be among those so fortunate. When war is finally gone, then the rules will no longer be needed. But until that time, if we are to accomplish what the visionaries dream, it will be through a realistic approach to war, its methods and its objectives. We must formulate our rules of conduct accordingly. If the proscriptions are impossible to follow, choas rather than regulation results. As I commented above, if we are to progress in the humanities of war, it will be by definitive rules which take into consideration the realities of

combat, and not by couching our hopes in codes containing such restrictive language that the rules become impossible to follow. The regulations relating to land, naval and aerial warfare, of which none of the latter are definitively codified as of yet, should be drafted or redrafted in such a way as to incorporate all of the legitimate exceptions to the rule of quarter. They should provide for reasonable contingencies in the expanding concepts of modern warfare and the atomic age. The rule in each area of combat, land, sea and air, including space, should be clearly enunciated along with its exceptions. Flexible provisions for expansion of the concept should be made. In this way, the warrior will know where he stands and he will have been extricated from the horns of the dilemma where he so frequently finds himself when the rules are often impossible to interpret and follow. It will be fine when there is no more war, but until then, speaking as a professional, it would be well to know the rules of the game.

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